Supreme Court, U.S.
FILED

No. 09-1381 JAN 12 2010

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In The

Supreme Court of the United States

CAROLYN MITCHELL,

Petitioner,

v.

ANCHORAGE POLICE DEPARTMENT and MUNICIPALITY OF ANCHORAGE, WALTER C. MONEGAN, OFFICER HENIKMAN and OFFICER VOSS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the appellate court erred in failing to recognize the important case of ***Washington v. Lambert***, 98 F.3d 1181 (9th Cir. 1996).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are the same as in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINION BELOW	1
JURISDICTION	1
AMENDMENT TO THE U.S. CONSTITUTION INVOLVED	1
STATEMENT OF FACTS	1
REASONS FOR GRANTING THE PETITION	3
THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUIT – AS TO THE HANDLING OF FOURTH AMENDMENT RIGHTS	3
CONCLUSION	4

APPENDIX

ORDER AND MEMORANDUM 09/03/09	App. 1
DISTRICT COURT AMENDED JUDGMENT 12/18/08	App. 4
JUDGMENT IN A CIVIL CASE 08/05/08	App. 6
MANDATE FILED 10/23/09	App. 8
ORDER 10/15/09	App. 9

TABLE OF AUTHORITIES

Page

CASES

Virginia v. Moore, 128 S.Ct. 1598 (2008) 3

Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996) 3

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

Alaska Statute § 11.41.500 2

CONSTITUTION

U.S. Constitution

Article IV 1

Fourth Amendment 2, 3

OPINION BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. Such decision and the pertinent rulings from the District Court are reprinted in the Appendix at 1 et seq.

JURISDICTION

The Ninth Circuit filed its decision on October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

AMENDMENT TO THE U.S. CONSTITUTION INVOLVED

Article IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Petitioner Carolyn Mitchell, who is African-American, was falsely arrested by Anchorage Police Department officers on May 8, 2004 of Bank Robbery,

Alaska Statute § 11.41.500. Ms. Mitchell had been shopping in a Sears Store, which is in a complex that also includes a bank, which had been robbed, reportedly by an African-American woman. The Anchorage Police officers drew firearms, pointing them at Ms. Mitchell, who had her twelve-year-old son with her and also handcuffed her. It was determined by a Bank official that Ms. Mitchell was not the suspect accused of bank robbery and Ms. Mitchell was then released. Ms. Mitchell filed an action under a defamation claim and 42 U.S.C. § 1983, based upon a Fourth Amendment violation and proceeded to trial before a jury and asked for judgment as a matter of law, which was denied. Prior to the trial, Ms. Mitchell asked for partial summary judgment, which was granted, holding that the Anchorage police officer had committed the tort of "false arrest."

On or about June 30, 2008, the matter went to trial before the U.S. District Court and a twelve person jury. At the end of trial, the jury received instructions regarding 1) defamation and 2) 42 U.S.C. § 1983, based on a Fourth Amendment violation.

After deliberating, the jury returned verdicts for the defendants as to Ms. Mitchell's defamation and 42 U.S.C. § 1983 claims. On the claim of false arrest, the jury awarded Ms. Mitchell one dollar ($1.00) in damages. The U.S. District Court thereafter awarded the Municipality of Anchorage attorney fees and costs of $45,593.50.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUIT – AS TO THE HANDLING OF FOURTH AMENDMENT RIGHTS

In ***Washington v. Lambert***, 98 F.3d 1181 (9th Cir. 1996) was held in conflict with this Court's decision of ***Virginia v. Moore***, 128 S.Ct. 1598 (2008). In ***Virginia v. Moore***, this Court held that "we have equated a lawful arrest with an arrest based on probable cause." 128 S.Ct. at 1607. In that case the issue was whether an officer, with probable cause to arrest, will violate the Fourth Amendment by making an arrest that violates state law. *Id.* at 1601. So, the principle of such case is that an arrest, unlawful under state law, does not violate the Fourth Amendment of it is supported by probable cause. *Id.* at 1608. The Court of Appeals below seemingly assumes that Mitchell's argument is the same as the defendant Moore, in ***Virginia v. Moore***. The Court below in reliance on ***Virginia v. Moore***, was in error given the lack of probable cause to arrest. The Court's decision below creates a conflict with ***Washington v. Lambert***, 98 F.3d 1181 (9th Cir. 1996), which held that "[u]nder ordinary circumstances, when police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment." 98 F.3d at 1187. Therefore, this Court should reverse and remand to the Ninth Circuit to consider this case under ***Washington v. Lambert***.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Dated: May 11, 2010.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Carolyn Mitchell, Plaintiff-Appellant, v. ANCHORAGE POLICE DEPARTMENT; MUNICIPALITY OF ANCHORAGE; WALTER C. MONEGAN; OFFICER HENIKMAN; OFFICER VOSS, Defendants-Appellees.	No. 08-35749 D.C. No. 3:05-cv-00273-JWS MEMORANDUM[*] (Filed Sep. 3, 2009)

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, Chief District Judge, Presiding

Argued and Submitted August 6, 2009
Anchorage, Alaska

Before: FARRIS, THOMPSON and Rawlinson, Circuit Judges.

After a jury verdict for the defendant Anchorage Police Department on the Plaintiff Carolyn Mitchell's

[*] This disposition is not appropriate for publication and is not precedent except as provided by the 9th Cir. R. 36-3.

§1983 claim, Mitchell made a renewed motion for summary judgment under Rule 50(b). The district court denied the motion orally. Mitchell's opening brief before us failed to indicate precisely that she appeals the post-Verdict summary judgment denial. Failure to raise an issue in an opening brief does not preclude review "if the failure . . . did not prejudice the defense of the opposing party." *Laboa v. Calderon*, 224 F.3d 972, 985 (9th Cir. 2000) (quoting *United States v. Ullah*, 976 F.2d, 514 (9th Cir. 1992). The Police Department's brief reveals that it was not prejudiced by Mitchell's imprecision. We review her appeal on the merits.

Mitchell's federal Fourth Amendment rights are unaltered by state law. *Virginia v. Moore*, 128 S. Ct. 1598, 1604-05 (2008). That the Police Department falsely arrested Mitchell under Alaska state law does not mean she was arrested in violation of the Fourth Amendment.

In analyzing an arrest, the trier of fact considers the totality of circumstances, including "not only how intrusive the stop was, but also whether the methods used [by police] were reasonable given the *specific circumstances*." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996). The Police Department was responding to an armed bank robbery that occurred just minutes earlier. Mitchell's physical characteristics were no identical to those of the suspect, but were a rough match. She was detained only as long as was necessary for police to

complete the show-up. *See United States v. Torres-Sanchez*, 83 F.3d 1123, 1129 (9th Cir. 1996). The district court did not err in finding that she was not entitled to summary judgment.

AFFIRMED.

Mitchell v. Anchorage Police, No. 08-35749
Rawlinson, Circuit Judge, concurring:

I concur in the affirmance of the judgment in favor of the Defendants because, and only because, the jury considered all of the arguments made by Plaintiff Carolyn Mitchell, and found that her constitutional rights were not violated under the circumstances. Once the case has been presented to the jury, the district court's denial of summary judgment is no longer an issue. *See Dixon v. Wallowa County*, 336 F.3d 1013, 1017 (9th Cir. 2003).

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Carolyn Mitchell,	)	
Plaintiff,	)	
vs.	)	**3:05-cv-273 JWS**
ANCHORAGE POLICE DEPT., *et al.*,	)	**AMENDED JUDGEMENT**
Defendants.	)	

Post judgment motion practice having been resolved the original judgment is hereby amended. The court having found liability against two of the defendants on plaintiff's first claim, the jury having returned a verdict on plaintiff's first claim for nominal damages of $1, the jury having returned verdicts for all defendants on all plaintiff's other claims, the court having found defendants to be prevailing parties, the court having awarded defendants $44,255 in attorney fees, and with defendant's costs to be taxed by the Clerk against plaintiff, **IT IS ADJUDGED:**

Defendants shall recover $44,254 from plaintiff plus costs of $1,339.50, or a total judgment of $45,593.50

DATED at Anchorage, Alaska this 18th day of December, 2008.

/s/ John W. Sedwick
UNITED STATES
DISTRICT JUDGE

** judgment with costs added re-distributed on 11/3/08.

*** judgment with correct total amount added and re-distributed on 12/18/08.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF ALASKA

CAROLYN MITCHELL,

Plaintiff,

v.

ANCHORAGE POLICE DEPARTMENT, et al.,

Defendant.

Case Number
3:05-cv-00273-JWS

JUDGMENT IN A CIVIL CASE

X **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury had rendered its verdict.

__ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision had been rendered.

IT IS ORDERED AND ADJUDGED:

THAT Plaintiff is awarded $1.00 on the State Law False Arrest Claim. Jury found in favor of the defendants on all remaining claims.

APPROVED:

/s/ JOHN W. SEDWICK
United States District Judge

Date: August 5, 2008

NOTE: Award of prejudgment interest, Costs and attorney's fees are governed by D. Ak. LR 54.1, 54.3, and 58.1.

/s/ IDA ROMACK
Ida Romach,
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Carolyn Mitchell, Plaintiff-Appellant, v. ANCHORAGE POLICE DEPARTMENT; MUNICIPALITY OF ANCHORAGE; WALTER C. MONEGAN; OFFICER HENIKMAN; OFFICER VOSS, Defendants-Appellees.	No. 08-35749 D.C. No. 3:05-cv-00273-JWS District of Alaska, Anchorage **MANDATE** (Filed Oct. 23, 2009)

The judgment of this Court, entered 09/03/2009, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/
By: Theresa Benitez
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Carolyn Mitchell,

Plaintiff-Appellant,

v.

ANCHORAGE POLICE DEPARTMENT; MUNICIPALITY OF ANCHORAGE; WALTER C. MONEGAN; OFFICER HENIKMAN; OFFICER VOSS,

Defendants-Appellees.

No. 08-35749

D.C. No. 3:05-cv-00273-JWS

District of Alaska, Anchorage

ORDER

(Filed Oct. 15, 2009)

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Rawlinson votes to deny the petition for rehearing en banc, and Judges Farris And Thompson so recommend.

The full court had been advised of the petition for rehearing en banc and no Judge had requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

165

(2)

No. 09-1381

JUL 13 2010

IN THE

Supreme Court of the United States

CAROLYN MITCHELL,

Petitioner,

v.

ANCHORAGE POLICE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the appellate court fail to recognize its own prior decision in *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996)? If so, did the appellate court err?

2. Has Petitioner presented any compelling reason to grant her Petition, where the appellate court's Memorandum affirming the District Court's post-verdict denial of judgment as a matter of law does not conflict with any decision of this Court or the appellate court, and where Petitioner does not claim that the appellate court's Memorandum implicates an important federal question that has not been settled by this Court?

INTRODUCTION

Petitioner has presented no "compelling reason" to grant her Petition for a Writ of *Certiorari*. Specifically, she has failed to demonstrate that the appellate court's Memorandum affirming the District Court's post-verdict denial of judgment as a matter of law is in conflict with a decision of this Court or another Court of Appeals. Nor has she demonstrated that the appellate court decided an important federal question that has not been settled by this Court. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

All facts underlying the Petition are reflected in the verdicts of the jury, which determined Respondents did not violate Petitioner's Fourth Amendment rights. Specifically, in their Special Verdict on Fourth Amendment Claims, the jurors found: (1) Respondent officers had a reasonable suspicion Petitioner was the bank robber they were seeking, and (2) their detention of her did not become an arrest under federal law.[1]

The District Court's judgment was affirmed, App. 1-3; panel rehearing and rehearing *en banc* were denied, App. 9.

To the extent the Petition states a question for this Court, the only fact material for this Court's *certiorari*

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1. The Judgment on that verdict is at App. 6. The completed "Special Verdict Form, Fourth Amendment Claims" is Dkt. 139 in the trial court record.

decision is whether the appellate court "failed to recognize" its own decision in *Washington*. Question Presented, App. i.

The appellate court not only "recognized" its 1996 case, *Washington*, it expressly mentioned it, App. 2, as quoted in its 2002 decision in *Gallegos*. Leading up to the appellate court's decision, both *Washington* and *Gallegos* had been briefed and argued before the District Court as well as the appellate court. Both courts concluded *Gallegos* was factually on point and *Washington* was not. There is no basis for the proposition that the appellate court "failed to recognize" its older decision in *Washington*.

Even assuming the appellate court had "failed to recognize" its own older decision, no part of Sup. Ct. R.10 would commend such a "failure" to this Court's attention on *certiorari*.

MISSTATEMENTS OF FACT AND LAW

Some misstatements of fact and law in the Petition may bear on what issues properly would be before the Court if certiorari were granted, and are therefore addressed pursuant to Rule 15.3:

1. The Petition at Question Presented, page (i.), asserts that the appellate court failed to "recognize" its own decision in *Washington*, when, in fact, the Ninth Circuit expressly cited *Washington*, quoting it within its discussion of the Circuit's more recent, on-point decision in *Gallegos v. City of Los Angeles*, 408 F.3d 987, 991 (Ninth Cir. 2002). App. at 2.

2. The Petition at 2 asserts that an Alaska statute entitled "Bank Robbery" was applied against Petitioner. No such Alaska statute exists; no statute of any kind was applied against Petitioner, and no offense was charged. Moreover, the statute which Petitioner cites, Alaska Stat. 11.41.500, is actually entitled "Robbery in the first degree."

3. The Petition erroneously asserts as fact, Petition at 2, that police officers "drew firearms, pointing them at Ms. Mitchell . . ." The way the officers used their weapons was a disputed question at trial, one which the jury was not asked to resolve. On the related question whether the officers had violated Ms. Mitchell's Fourth Amendment rights, the jury found in the negative. Because the jury did not make a finding on how the officers used their weapons, Petitioner should not present her version as a fact of record in this case.

REASONS FOR DENYING THE PETITION

The Petition presents no conflict among the circuits, no compelling reason for review, nor even an important and unsettled legal issue.

A. The Petition presents no conflict among the circuits. Notwithstanding its assertion to the contrary, the Petition presents no conflict among the circuits. At 3, Petitioner's heading refers to "THE SPLIT IN THE CIRCUIT" (*sic*), and is followed immediately by this sentence: "In *Washington v. Lambert* . . . was held in conflict with this Court's decision of *Virginia v. Moore* . . ." (*sic*).

A "SPLIT IN THE CIRCUIT," assuming one existed, need not reach the attention of this Court. It would be a matter for the circuit to resolve. For purposes of *certiorari* decisions, a "split" or conflict *within* a circuit is of no concern. Thus, Sup. Ct. R. 10(a) does not supply a basis for this Court's discretionary review.

As for the incoherent sentence that followed the heading, Respondents cannot identify what "conflict" Petitioner means to assert. If, *arguendo*, she perceives a "conflict" between a 1996 decision by the appellate court, and a 2008 decision by this Court, that "conflict" ended before it began. Such a "conflict" would not even merit this Court's consideration in deciding whether to grant review. That is, assuming *arguendo* that *Washington* and *Virginia v. Moore* were in conflict, issuance of the latter would have trumped the former.

B. The Petition articulates no important and unsettled question of federal law. The Petition does not attempt to assert that the appellate court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." No such federal question is stated. Thus, Sup. Ct. R. 10(c) does not supply a reason for this Court's discretionary review.

C. The Petition offers no "compelling reasons" for this Court's review. Nothing in the Petition provides "compelling reasons" for this Court to review the appellate court's Memorandum, which affirmed the District Court's judgment, based on the jury's findings, following a full trial

on the merits.[2] Thus, Sup. Ct. R. 10 does not supply grounds on which the Court should exercise its discretion and review the appellate court's ruling.

CONCLUSION

Petitioner has established no compelling reasons for this Court to grant her Petition. Therefore, Respondents respectfully request the Petition be denied.

Respectfully submitted,

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2. The Memorandum, in turn, was followed by denial of panel rehearing and rehearing *en banc*. App. 9.